

Before the  
**FEDERAL COMMUNICATIONS COMMISSIONS**  
Washington D.C. 20554

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In re Applications of	)	MM Docket No. 91-309
	)	
KIMLER BROADCASTING, INC.	)	File No. BPH-900122MN
	)	
ARTISTIC AIRWAVE BROADCASTERS	)	File No. BPH-900122MP
	)	
LAURA WILKINSON HERRON	)	File No. BPH-900122MY
	)	
For a Construction Permit for a New	)	
FM Broadcast Station on Channel 233A	)	
at Temecula, California	)	

**ORDER**

Adopted: May 10, 1999

; Released: May 12, 1999

By the Assistant General Counsel, Administrative Law Division:

1. This order identifies the above-captioned applicants as the only qualified bidders eligible to participate in an auction for a construction permit for a new FM station on Channel 233A in Temecula, California. It refers their applications to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications and stays the hearing proceeding in Docket No. 91-309 pending the outcome of the auction.

2. The ALJ concluded that Artistic Airwave Broadcasters was the comparative winner, based in part on its superior integration proposal.<sup>1</sup> Exceptions to the Initial Decision filed by Kimler Broadcasting, Inc., Laura Wilkinson Herron and a third applicant that subsequently dismissed its application were pending before the former Review Board when the court issued its decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), holding that continued reliance on the integration criterion is arbitrary and capricious and therefore unlawful. On February 25, 1994 the Commission stayed the adjudication of all comparative broadcast cases pending resolution of

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<sup>1</sup>*Frank K. Spain*, 8 FCC Rcd 4831 (ALJ. 1993).

the questions raised by *Bechtel*.<sup>2</sup>

3. In the Balanced Budget Act of 1997 Congress adopted Section 309(l) expressly providing that the Commission "shall have the authority to conduct a competitive bidding proceeding pursuant to subsection [309](j)" in comparative broadcast cases involving competing applications filed before July 1, 1997, and that if the Commission does conduct a competitive bidding proceeding, it "shall treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding."

4. In implementing Section 309(l) in the *First Report and Order*, the Commission found that the public interest would be best served by using auctions instead of comparative hearings to resolve the frozen comparative cases that are not otherwise settled, and devised special auction procedures for frozen hearing applicants.<sup>3</sup> Specifically, the Commission directed the General Counsel to issue an order under delegated authority in hearing cases pending before the Commission that would identify the eligible, qualified bidders entitled to participate in the auction. The Commission stated that the General Counsel should refer all such cases to the Mass Media Bureau for processing in accordance with the Commission's auction procedures and either terminate or stay the hearing proceeding, depending on whether there were any unresolved hearing issues (including any unresolved petitions to enlarge issues) as to the basic qualifications of any particular applicant.<sup>4</sup> The hearing proceeding would resume after the auction, the Commission indicated, only if such unresolved qualifying issue(s) involved the auction winner. The Commission also clarified that applicants whose applications had been finally dismissed or denied would not be eligible to participate in the auction but that all applicants remaining in the proceeding would be entitled to participate in the auction without regard to any unresolved hearing issues (or outstanding petitions to enlarge issues) as to their basic qualifications.<sup>5</sup> Upon the elimination of the Review Board, this proceeding was certified to the Commission.<sup>6</sup>

5. There has been no settlement agreement among the three above-captioned applicants,

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<sup>2</sup>*FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

<sup>3</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234) (First Report and Order), 13 FCC Rcd 15920, 15933 ¶ 34, 15952-56 ¶¶ 88-98 (1998), reconsideration denied, FCC 99-74 ¶¶ 7-9, 14-18 (rel. Apr. 20, 1999).

<sup>4</sup>13 FCC Rcd at 15954 ¶ 92.

<sup>5</sup>*Id.* at 15962-63 ¶ 89.

<sup>6</sup>*Los Amigos Media*, 11 FCC Rcd 5294 (Rev. Bd. 1996).

all of whom filed their applications before July 1, 1997. The permittee for a new FM station on Channel 233A in Temecula, California will therefore be selected by a system of competitive bidding, pursuant to the Commission's auction procedures for the frozen hearing applicants. All three of the above-captioned applicants are eligible, qualified bidders entitled to participate in this auction, inasmuch as none of their applications has been finally dismissed or denied. And, of the eighteen applications designated for hearing in Docket MM 91-309, only the applications filed by Kimler, Artistic Airwave, and Herron are still pending before the Commission.<sup>7</sup> As required by Section 309(l), the three pre-July 1, 1997 pending applicants are the only qualified bidders eligible to compete in the auction. The date of the auction, as well as the deadline for filing the mandatory short-form application,<sup>8</sup> will be announced by a Public Notice issued under delegated authority by the Wireless Telecommunications Bureau and the Mass Media Bureau. By that Public Notice, the Bureaus will also seek comment on a variety of auction-specific procedural issues concerning the day-to-day conduct of the auction for the construction permit for FM Channel 233A (Temecula, California).

6. Based on the record in this case, it is also appropriate to stay the hearing proceeding in Docket 91-309 pending the outcome of the auction. The hearing proceeding will resume only if Artistic Airwave or Herron wins the auction. There are unresolved questions regarding the basic qualifications of these applicants. In particular, Herron's exceptions seek review of the ALJ's favorable resolution of a misrepresentation issue against Artistic Airwave. Herron also filed a motion to reopen the record and enlarge the issues seeking the addition of misrepresentation, lack of candor and abuse of process issues against Artistic Airwave. Also pending before the Commission is Artistic Airwave's motion to reopen the record seeking the addition of site availability and misrepresentation issues against Herron. Pursuant to the comparative freeze the Commission has taken no action on either motion to reopen the record. If either Artistic Airwave or Herron wins the auction, the hearing proceeding in MM Docket No. 91-309 will therefore resume to permit Commission consideration of any outstanding hearing issues and pending petitions to enlarge issues that relate to the auction winner's basic

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<sup>7</sup>Seven applicants prosecuted their applications through an Initial Decision by an Administrative Law Judge. *Frank K. Spain*, 8 FCC Rcd 4831 (ALJ. 1993). Three applicants, Frank K. Spain, Avid Communications, and Natalie Lederer Rogers, however, did not file exceptions to the Initial Decision, and their applications were dismissed by the Review Board. *Frank K. Spain*, 9 FCC Rcd 2528 (Rev. Bd. 1994), *review denied*, 10 FCC Rcd 140 (1995). No further review was sought and the dismissal of their applications is therefore final. The Review Board subsequently approved a settlement agreement between Artistic Airwave and Los Amigos Media that provided for the dismissal with prejudice of Los Amigos Media's application. *Los Amigos Media*, 10 FCC Rcd 4973 (Rev. Bd. 1995).

<sup>8</sup>In order to participate in the auction, pending applicants must file short-form applications indicating their intention to compete in the auction. *First Report and Order*, 13 FCC Rcd at 15950 ¶ 82.

qualifications insofar as such issues, or issue requests raise substantial and material questions of fact as to matters that are pertinent under our competitive bidding procedures for frozen hearing applicants.<sup>9</sup> The hearing proceeding will not resume, however, if Kimler wins the auction, inasmuch as there are no outstanding hearing issues or unresolved petitions to enlarge issues relating to its qualifications.

7. Prior to the auction, settlement agreements filed pursuant to 47 U.S.C. § 311(c) and all applicable Commission rules, including 47 C.F.R. § 1.2105(b), should be filed with the Commission, but all other matters should be presented directly to the Mass Media Bureau for resolution in accordance with the procedures for mutually exclusive applications for new FM broadcast stations.

8. ACCORDINGLY, IT IS ORDERED That, pursuant to delegated authority, as provided in the *First Report and Order*, 13 FCC Rcd at 15954-55 ¶ 94, the applications filed by Kimler Broadcasting, Inc. (File No. BPH-900122MN), Artistic Airwave Broadcasters (File No. BPH-900122MP), and Laura Wilkinson Herron (File No. BPH-900122MY) ARE REFERRED to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications; and that Kimler Broadcasting, Artistic Airwave Broadcasters, and Laura Wilkinson Herron ARE IDENTIFIED as the only qualified bidders, eligible to participate in the auction for a construction permit for a new FM station on Channel 233A in Temecula, California.

9. IT IS FURTHER ORDERED That the hearing proceeding in Docket MM 91-309 IS STAYED pending the outcome of the auction and the hearing proceeding WILL RESUME to consider the basic qualifications of the auction winner only if either Artistic Airwave Broadcasters or Laura Wilkinson Herron wins the auction, and otherwise IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

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<sup>9</sup> In the *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99, the Commission indicated that, in these resumed hearing proceedings, it would consider unresolved site issues (or add new site issues if substantial and material questions of fact are raised in pending or new petitions to enlarge issues) against the winning bidder only to the extent the issues involve questions of false certification.